IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC94554
	)	
GARY L. COLEMAN,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOUR SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY, MISSOURI
13th JUDICIAL CIRCUIT
THE HONORABLE KEVIN M.J. CRANE, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Gary Coleman, was found guilty of second degree robbery, Section 569.030, following a bench trial in Callaway County before the Honorable Kevin M.J. Crane. Judge Crane sentenced Mr. Coleman to ten years in the Missouri Department of Corrections, and an appeal was taken to the Court of Appeals, Western District. Pursuant to Rule 83.02, the Court of Appeals transferred this case to this Court after reversing Mr. Coleman's conviction for insufficient evidence. This Court has jurisdiction over this cause pursuant to Article V, Section 10, Mo. Const. (as amended 1976).

STATEMENT OF FACTS

Mr. Coleman relies on the Statement of Facts presented in his opening brief in the Court of Appeals, Western District, which has been transferred to this Court.

POINT RELIED ON

The trial court erred in overruling Mr. Coleman's motion for judgment of acquittal at the close of all the evidence, finding him guilty, and thereafter sentencing him for second degree robbery because doing so violated Mr. Coleman's right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was insufficient evidence from which it could be found, beyond a reasonable doubt, that Mr. Coleman threatened the immediate use of physical force, to sustain his conviction for second-degree robbery.

State v. Brooks, 2014 WL 5857020;

State v. Collinsworth, 966 P.2d 905, 908 (Wash. App. 1997);

State v. Hernandez, 79 P.3d 1118, 1120-21 (N.M. App. 2003);

U.S. Const., Amendment XIV;

Mo. Const., Art. I, Section 10;

18 U.S.C. § 2113;

Section 569.030, RSMo. 2000; and

Section 570.025, (L.2014, S.B. No. 491, § A, eff. Jan. 1, 2017).

ARGUMENT

The trial court erred in overruling Mr. Coleman's motion for judgment of acquittal at the close of all the evidence, finding him guilty, and thereafter sentencing him for second degree robbery because doing so violated Mr. Coleman's right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was insufficient evidence from which it could be found, beyond a reasonable doubt, that Mr. Coleman threatened the immediate use of physical force, to sustain his conviction for second-degree robbery.

Mr. Coleman walked into the New Bloomfield branch of Bank Star One (TR 24-25; Ex. 10). He leaned on the counter and said to the teller, "I need you to do me a favor. Put the money in this bag." (TR 28). His voice was calm and polite, and he handed her a plastic sack (TR 28, 35-37). Mr. Coleman did not display a weapon, and he did not threaten to harm the teller in any way (TR 37). He did not physically put his hands on her or injure her; passing the bag to her was the entirety of the physical contact between them (TR 38).

When another employee walked behind the counter, Mr. Coleman said to her in a calm, polite voice "Ma'am, I need you to stop where you are and do not go any farther" (TR 47). The teller opened her drawer, put loose bills in the sack,

handed it back to Mr. Coleman, and he left the store (TR 29). The entire encounter lasted 45 seconds (TR 30).

Mr. Coleman's actions inside the bank conveyed no threat and his behavior and words were themselves non-threatening - certainly less so than the Defendant in *State v. Brooks*, 2014 WL 5857020. Unlike Mr. Brooks, Mr. Coleman wore no disguises, his words conveyed no express knowledge of bank procedures, and he made no threatening gestures at all (no slamming of the hand, as in *Brooks, supra*).

This Court can and should distinguish Mr. Coleman's behavior from that of the defendant in *Brooks* and find that his actions did not constitute a threat of immediate use of physical force. However, if this Court's opinion in *Brooks* created a bright line rule – that "a demand for money in [a bank] is an implicit threat of the use of force in and of itself " – *Brooks* at 3, citing *United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002), it was wrongly decided and should be reconsidered.

If *Brooks, supra,* stands for the proposition that any unlawful request for money in a bank constitutes an implicit threat of the immediate use of physical force, regardless of the defendant's accompanying words or behavior – i.e., that the simple location of the unlawful request, a bank, is dispositive – then this Court has created a new law and usurped the legislative function. *See City of Charleston ex rel. Brady v. McCutcheon*, 360 Mo. 157, 165, 227 S.W.2d 736, 739 (1950) (this

Court cannot usurp the function of the General Assembly, or by construction rewrite its acts.)

The Missouri Legislature has not created a bank robbery statute, with strict liability for a defendant's words inside of a bank, regardless of his conduct. This Court in *Brooks*, *supra*, however, has determined that a defendant's identical behavior exhibited inside a convenience store or out on the street is analyzed differently when it occurs inside of a bank; such a determination is not the prerogative of this Court, but of the Legislature.

Respondent is correct that "[n]umerous federal cases interpreting the federal bank robbery statute, 18 U.S.C. §2113, have concluded that the mere demand for money from a telling in a bank meets a higher burden of establishing "conduct reasonably calculated to produce fear." However, the federal bank robbery statute requires the use of force, violence or intimidation in the taking or attempted taking of money from *a bank*. §2113(a). These cases solely involve a defendant's conduct inside of a bank, and have defined "intimidation" in that context as "conduct and words ... calculated to create the impression that any resistance or defiance by the [teller] would be met by force." *United States v. Waldon*, 206 F.3d 597, 604 (6th Cir.2000) (citation and internal quotation marks omitted).

Missouri's second degree robbery statute however, is not location specific, and this Court cannot transform a stealing into a robbery simply by virtue of the location where the stealing occurs. An analysis of the phrase "forcibly steals"

cannot mean different things depending on the location where the alleged conduct happens. It is also worth noting that the Legislature, in rewriting the second degree robbery statute, *Section 570.025* (effective January 1, 2017), has required an even higher standard of force than currently exists. Under the new second degree robbery statute, "a person commits the offense of robbery in the second degree if he or she forcibly steals property *and in the course thereof causes physical injury to another person*." Neither Mr. Coleman nor Mr. Brooks would have been guilty of second degree robbery under the new statute, as no physical injury resulted.

The other state cases cited by Respondent are also readily distinguishable from the facts here. In *State v. Collinsworth*, 90 Wash. App. 546, 553, 966 P.2d 905, 908 (1997), the defendant reiterated his demands and told the teller not to include "bait" money or "dye pack," thereby underscoring the seriousness of his intent. *Id.* Again, Mr. Coleman showed no such special knowledge of bank procedures.

In *State v. Hernandez*, 134 N.M. 510, 512-13, 79 P.3d 1118, 1120-21 (N.M. App. 2003), the defendant pointed a note at the teller's cash drawer, while keeping his other hand hidden from view, stated that the teller should give him everything, and directed the teller not to use the alarm. The Court found that the evidence reflected more than a "mere demand" for money. *Id.* No comparable conduct occurred in Mr. Coleman's case.

Finally, in *State v. Losey*, 2006 WL 3802925 (Iowa App. 2006), the defendant was overdressed for the hot weather and was carrying a large envelope. Upon entering the bank, Losey approached a bank teller and handed her a note that read, "Put the money in the envelope and no ink bombs." *Id.* at 3. Losey did not speak to the clerk, but simply stood by the teller's window holding the envelope open to receive the money he demanded. *Id.* at 3. The clerk was frightened by Losey's demands and thought the note referred to a bomb. *Id.* at 3. Again, these circumstances reflect more than a "mere demand" for money, and reflect a special knowledge of bank procedures. These circumstances are more similar to the defendant's behavior in *Brooks, supra,* than to Mr. Coleman's.

Since Mr. Coleman neither said nor did anything to threaten the immediate use of physical force, and because his location alone should not be dispositive as to whether a threat has been implied by the mere demand for money, the State has simply failed to prove that Mr. Coleman threatened the immediate use of physical force to obtain money from the bank. This Court should reverse.

CONCLUSION

Because the evidence was insufficient to convict Mr. Coleman of second degree robbery, this Court should reverse his conviction and order his discharged.

Respectfully submitted,

/s/ Amy M. Bartholow

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains 1,662 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 9th day of December, 2014, electronic copies of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Robert J. (Jeff) Bartholomew, Assistant Attorney General, at jeff.bartholomew@ago.mo.gov.

/s/ Amy M. Bartholow

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